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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

CARLOTTA MITCHELL,

Petitioner,

vs.

ALBUQUERQUE BOARD OF EDUCATION, d/b/a ALBUQUERQUE PUBLIC SCHOOLS, LILLIAN BARNA, JOE GROOM and JOHN MONDRAGON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Title VII preclusion rule in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982), apply *outside of* the Section 706 deferral scheme?

II. Does a school board administrative finding of "cause" for termination *by inference* constitute adverse decision as to racial bias, precluding Title VII and Equal Protection claims, where at the hearing the employee stated, *inter alia*, that the charge of "insubordination" was a "pretext" for racial bias, where the issue of unequal treatment based upon race was not litigated, and where there were no Findings of Fact or Conclusions of Law pertaining to "pretext," unequal treatment or race discrimination?

III. Does the Tenth Circuit decision, that the board's determination of "cause" for termination "necessarily rejected" Title VII and Equal Protection claims of race discrimination, violate precedent of this Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 286 (1976), that determination of "cause" for termination does *not* preclude race discrimination claims?

IV. Should *Kremer*, if it does apply, be overturned as violative of Title VII, comity, federalism, and the principle of "exhaustion of remedies," and thereby "unworkable," where it can also be shown that reversal will not cause "serious inequity" or "significant damage to the stability of the society governed by the rule in question," per the *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), *stare decisis* standard?

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Catania, State Employment Discrimination Remedies and Pendant Jurisdiction under Title VII: Access to Federal Courts, 32 Am.U.L.Rev. 777 (1983) 17

Comment, Res Judicata in Successive Employment Discrimination Suits, 1980 U.Ill.L.F. 1049 17

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Mann, Federalism Issues and Title VII: Kremer v. Chemical Construction Corp., Vol. XIII New York University Review of Law & Social Change 411 (1984-85) 17

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Weeden, The Effect of Section 706 State Agency Proceedings Upon Subsequent Title VII Claims, 14 North Carolina Central L.J. 473 (Spring 1984) 18

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carlotta Mitchell respectfully prays that a writ of certiorari issue to review the Order And Judgment of the Court of Appeals for the Tenth Circuit entered in the above entitled proceeding August 13, 1993.

OPINIONS BELOW

The unpublished Order And Judgment of the Court of Appeals for the Tenth Circuit, No. 91-2294, is reprinted in APPENDIX A hereto.

The U.S. District Court, District of New Mexico, Order And Summary Judgment, Civ. No. 86-1184, including transcript of oral Findings of Fact and Conclusions of Law, is reprinted in APPENDIX B hereto.

JURISDICTION

The date of entry of the Order And Judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed herein is August 13, 1993. (APPENDIX A)

The statutory provision conferring jurisdiction on the Court to review the decision in question by writ of certiorari is Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment, Sec. 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Title 42 U.S.C. Section 2000e-2 [Title VII]. Unlawful Employment Practices

(a) **Employer practices.** It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Section 706 of the Civil Rights Act of 1974, 78 Stat. 259, Title 42 U.S.C. 2000e-5(a)-(g), Public Law 92-261

Sec. 6(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title.

Title 28 U.S.C. Section 1738

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the

courts of such State, Territory or Possession from which they are taken.

Title 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 22-10-17 NMSA 1978 (Repl. 1984). Discharge; procedure.

A local school board may discharge certified school personnel and the governing authority of a state agency may discharge certified school instructors during the term of written employment contracts only according to the following procedure:

A. serving a written notice of discharge on the person in accordance with the law for service of process in civil actions;

B. stating in the notice of discharge the following:

(1) the cause or causes for discharging the person; and

(2) a place within the school district or state agency and a date not less than five days nor more than fifteen days from the date of service of the notice of discharge for a hearing before the local school board or the governing authority of the state agency;

C. conducting a hearing according to the regulations prescribed by the state board; and

D. finding cause for discharging the person pursuant to the employment contract with the person or finding any other good and just cause for discharging the person.

> Section 22-10-19 NMSA 1978 (Repl. 1984). Hearings before local school boards and governing authorities of state agencies; regulations.

A. [A]ll parties involved [shall have the] opportunity to appear and present testimony and information on all pertinent issues;

B. . . . the person refused reemployment or to be discharged may be represented by counsel;

C. . . . the technical rules of evidence and the rules of civil procedure shall not apply to the hearings. Such hearings shall be conducted in an informal manner, but the contentions or the defenses of each party to the hearing shall be amply and fairly presented without substantial prejudice;

D. after the completion of the informal hearing, the local school board or the governing authority of the state agency, shall render its decision in writing and such decision shall

include a brief statement of the reasons for the discharge or refusal to reemploy; and

E. . . . within ten days from the date of the hearing, the local school board or the governing authority of the state agency shall serve a written copy of its decision upon the person refused reemployment or to be discharged.

> Section 22-10-20 NMSA 1978 (Repl. 1984). Appeals to the State Board [of Education, and review by the State Court of Appeals].

See APPENDIX G for full text. Part "J," regarding State Court of Appeals review, provides as follows:

J. Any party aggrieved by the decision of the state board pursuant to this section may appeal the decision to the court of appeals by filing a notice of appeal with the clerk of the court within thirty days after the service of a written copy of the decision of the state board on the party. Upon appeal, the court of appeals shall affirm the decision of the state board unless the decision is found to be:

(1) arbitrary, capricious or unreasonable;

(2) not supported by substantial evidence; or

(3) otherwise not in accordance with law.

STATEMENT OF THE CASE

Petitioner Carlotta Mitchell, a Black woman, had been employed as an elementary school teacher in the Albuquerque Public Schools for *eleven years;* then she began teaching fifth grade at Bandelier School in Albuquerque for the 1985-86 school year, where there had been no other Black person employed in "recent memory." (APPENDIX, C1, F2)

Certain "parents were racially prejudiced and did not wish to have a Black person employed in a position of authority at Bandelier School." (APPENDIX, F3) "[A] number of complaints were lodged against [Carlotta] to the school administrator," Respondent Groom. (APPENDIX, F3) "In response to the parental complaints [, knowing that they] were unfounded, Groom attempted to encourage [Petitioner] to transfer to another school; when his efforts failed [he] attempted to force [Petitioner] to transfer." (APPENDIX, F3) "[Respondents] failed to investigate the complaints and accepted [them] at face value. [The complaints] were false and motivated by racism." (APPENDIX, F3) "As a pretext to force transfer [, Mr. Groom] issued an order [to Carlotta Mitchell] to prepare an improvement plan [, which she] attempted in good faith to respond to. [The] "improvement plan" and order [were unlawful, violating her] collective bargaining agreement." (APPENDIX, F4) "No efforts of [Petitioner] were acceptable, nor indeed could any efforts of the [Petitioner] be acceptable [,] because the improvement plan was a pretext to cause her removal from the school" because of her race. (APPENDIX, F4)

Petitioner was terminated on December 27, 1985, on grounds of "insubordination." (APPENDIX, D5; *see also* Section 22-10-17 NMSA 1978 (Repl. 1984)) During the non-Section 706 "for cause" hearing before the local school board, Petitioner argued, *inter alia*, that the reason for discharge was "pretextual and that race played a role in the decision" to remove her, that "parents in the school district [did not like her] due to a racial aspect," and that "a parent told her that the teacher she had replaced had informed the parent that a [B]lack teacher was coming to the neighborhood and asked her what she would do about it." (APPENDIX, H2)

There are no other references to race or pretext on the record. (APPENDIX, H2)

Petitioner appealed her termination for "insubordination" (for failure to submit "improvement plans") to the State Board of Education, which affirmed. (APPENDIX, D) Then she submitted her case to non-*de novo* review by the State Court of Appeals, which affirmed the State Board decision as "in accordance with law." (APPENDIX, C) These non-Section 706 "administrative proceedings," including the non-*de novo* review by the State Court of Appeals, were statutory. (*See* Sections 22-10-17, 22-10-19, and 22-10-20 NMSA 1978 (Repl. 1984))

There were no Findings of Fact or Conclusions of Law whatsoever adverse to or mentioning race discrimination, "pretext" for racial bias, or unequal treatment based upon race. (APPENDIX, C–E)

Prior to the State Court of Appeals review, on September 26, 1986, Petitioner had filed Equal Protection and Title VII race discrimination claims in the U.S. District

Court for the District of New Mexico, *see* Complaint For Violation Of Civil Rights, APPENDIX F. On May 10, 1988, after the State Court of Appeals decision, the court granted Respondents' motion for summary judgment, premised upon Title 28 U.S.C. Section 1738, collateral estoppel, and *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). (APPENDIX B)

The Tenth Circuit Court of Appeals affirmed the district court on August 13, 1993, finding that *Kremer* applied to this non-Section 706 agency non-*de novo* court reviewed determination, *inferring* an adverse decision as to race discrimination out of the "for cause" termination for "insubordination": "the local board's decision that Mr. Groom's request was lawful [per Section 22-10-17 NMSA 1978 (Repl. 1984)] and that Plaintiff was insubordinate *necessarily rejected* Plaintiff's claims that the request was discriminatory." (Emph. Supp.) (APPENDIX, A10)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, THAT *KREMER* APPLIES TO AN ADMINISTRATIVE BODY OTHER THAN A SECTION 706 DEFERRAL AGENCY, WHERE "PRETEXT" FOR RACIAL BIAS WAS MENTIONED BUT NOT FULLY LITIGATED IN THE COURSE OF DEFENDING AT THE SCHOOL BOARD "FOR CAUSE" EMPLOYMENT TERMINATION HEARING CONCERNING ALLEGED VIOLATION OF "TERMS AND CONDITIONS" OF EMPLOYMENT, WHERE SUBSEQUENT NON-*DE NOVO* STATE COURT AFFIRMANCE

OF "CAUSE" FOR TERMINATION OCCURRED, WHERE THERE WAS NO REFERENCE TO "PRETEXT", RACE DISCRIMINATION OR UNEQUAL TREATMENT WHATSOEVER IN THE FINDINGS OF FACT OR RULINGS OF LAW, **CONFLICTS WITH DECISIONS OF OTHER U.S. COURTS OF APPEALS ON THE SAME MATTER, NAMELY THE SECOND, THIRD AND ELEVENTH CIRCUITS WHICH DO NOT APPLY *KREMER* PRECLUSION TO NON-SECTION 706 AGENCIES,** NOR DO THEY PERMIT AN INFERENCE OF ADVERSE RULING ON RACE DISCRIMINATION CLAIMS IN THIS CONTEXT; **THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, THAT *KREMER* APPLIES TO NON-SECTION 706 AGENCY DETERMINATIONS, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT;** MOREOVER, **THE TENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRECEDENT OF THIS COURT IN *McDONALD*, THAT A FINDING OF "CAUSE" FOR TERMINATION FROM EMPLOYMENT DOES NOT, BY INFERENCE, CONSTITUTE ADVERSE DECISION ON A RACE DISCRIMINATION CLAIM.**

The New Mexico Court of Appeals affirmance of administrative school board finding of "cause" for termination for violation of "terms and conditions" of public employment in this case was by statute a non-*de novo* review, limited to the record before it and decision as to whether the school board's ruling was "arbitrary, capricious or unreasonable; not supported by substantial evidence; or otherwise not in accordance with law." Section

22-10-20 J NMSA (Repl. 1984). "[T]he record prepared and submitted by the defendants [Respondents] discloses only a few extremely minor references to race in the hearing before the local board, one comment regarding pretext [for racial bias]." (APPENDIX G) None of the findings of fact or rulings in this case mentions race discrimination, unequal treatment, or "pretext" for racial bias. (APPENDIX, C-E)

The Tenth Circuit's holding that the Section 1983 Equal Protection and Title VII race discrimination claims were "necessarily rejected" and precluded, per *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982), and *University of Tennessee v. Elliott*, 478 U.S. 790 (1986) (APPENDIX, A10-A11), is in direct violation of *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 286, 283 (1976) (a finding of "cause" for termination from employment does not, by inference, constitute adverse decision on a race discrimination claim).

The Tenth Circuit decision is also in direct conflict with other circuit courts of appeals. *See* the U.S. Court of Appeals for the Second Circuit's decision in *Hill v. Coca Cola Bottling Co. of New York*, 786 F.2d 550 (2nd Cir. 1986), which involved a state labor department administrative hearing as to entitlement of unemployment benefits of a Black employee who was terminated for violating company policy. The administrative decision, which denied benefits because of misconduct, was appealed to the administrative appeal board, which affirmed. That decision was appealed to the state district court, which also affirmed. Upon appeal to the Second Circuit, the court discussed *Kremer, supra*, the New York collateral estoppel rule (which contains the same wording "necessarily

decided" as does the New Mexico rule, *Shovelin v. Central New Mexico Electric Cooperative*, 850 P.2d 996, 1000 (N.M. 1993)), and *Board of Education v. New York State Human Rights Appeal Board*, 482 N.Y.S.2d 495 (1984). In *Board of Education, supra* at 497, "the employee's racial claims were only 'briefly explored' in the unemployment insurance proceeding." The Second Circuit in *Hill* likewise rejected argument that the discrimination claim was "technically" submitted to the appeal board. *"[C]laim of race discrimination . . . [was] barely mentioned."* (Emph. Supp.) *Hill, supra* at 553. "The record reveals no significant exploration of this matter . . . and ***significantly . . . [there is] no mention of racial discrimination . . . in any of the decisions of the four tribunals that considered Hill's unemployment insurance application.***" (Emph. Supp.) *Id.* at 554. ***"Moreover, . . . New York has a separate agency for hearing discrimination complaints . . . ' [, therefore] complainant could not have foreseen . . . bar [of] a subsequent anti-discrimination complaint.' "***[1] (Emph. Supp.) *Id.* The Second Circuit Court of Appeals affirmed the U.S. district court, "hold[ing] that Hill is not precluded from pursuing his discrimination claim . . . because *he did not have a full and fair opportunity to litigate that claim before the state's unemployment insurance agency.*" (Emph. Supp.) *Id.* *"It would be unfair to penalize Hill, through the doctrines of res judicata and collateral estoppel, for employing authorized state*

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[1] New Mexico likewise has a separate Section 706 agency for prosecution of race discrimination claims. *See* New Mexico "Human Rights Act," Sections 28-1-1 – 28-1-15 NMSA 1978 (Repl. 1984).

procedures, particularly when the litigated issue in the unemployment insurance proceeding barely touched on the discrimination claim." (Emph. Supp.) *Id. Furthermore, "a finding of termination for just cause does not necessarily negate a subsequent finding of discrimination.* * * * '[W]hile crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination.' *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283. . . . " (Emph. Supp.) *Id.* at 553.

See also the U.S. Court of Appeals for the Third Circuit decision in *Kelly v. TYK Refractories Co.*, 860 F.2d 1188, 1197 (3rd Cir. 1988), where the court decided that it *cannot "infer . . . findings" of an adverse ruling on a race discrimination claim* where there are no administrative findings of fact or ruling pertaining to same for purpose of collateral estoppel of a Title 42 U.S.C. Section 1981 action.

See also the U.S. Court of Appeals for the Eleventh Circuit decision in *Carlisle v. Phenix City Board of Educ.*, 849 F.2d 1376 (11th Cir. 1988), which involved a school board hearing regarding transfer of the principal for "staff dissention resulting from poor leadership," which hearing lasted four days, and where the party was represented by counsel. The decision to transfer was appealed to the Tenure Commission, which reversed. The school board then petitioned the state circuit court for writ of mandamus. The circuit court issued the writ and vacated reversal, reinstating the school board's decision of transfer. The Tenure Commission then appealed to the state court of appeals, which affirmed the circuit court. *During the course of administrative litigation there were "only a few references to race. The only substantive assertion of race bias*

came during cross-examination of the school superintendent. . . . " (Emph. Supp.) *Id.* at 1379 fn. 2. Carlisle then raised a claim of discrimination with the EEOC, received a right to sue letter, then filed Title VII and Title 42 U.S.C. Section 1983 Equal Protection claims in federal district court. The U.S. district court held that the suit was precluded by collateral estoppel and Title 28 U.S.C. Section 1738, per *Kremer, supra,* and *University of Tennessee, supra.* The Eleventh Circuit reviewed the case and reversed, finding that the cross-examination as to racial bias "only remotely relate[d] to Carlisle's Title VII claim," though it "brought out implications of racial bias." *Id.* at 1379. *"What was decided by the state appeals [court] was that the board did have legitimate reasons . . . for transferring Carlisle."* (Emph. Supp.) *Id.* at 1379-80. "Carlisle could be thus collaterally estopped from asserting that there were no legitimate reasons for his transfer, but he cannot be estopped from asserting that there was an illegitimate racial reason in addition." *Id.* at 1380. *"The absence of racial bias on the part of the board . . . was not a finding made in the course of the state proceedings."* (Emph. Supp.) *Id. "This case differs significantly from Kremer . . . in which racial discrimination was the focused issue of the [Section 706] New York administrative proceedings and had been fully asserted and pointedly decided by the time of the federal proceedings."* (Emph. Supp.) *Id.* at 1380 fn. 3.

In the case at bar, the Tenth Circuit failed to make the above differentiation between Section 706 and non-Section 706 agency determination. The Tenth Circuit decided that *Kremer* applies to a non-Section 706 agency: the school board is not a Section 706 agency. The Supreme Court has not decided this important question, which

involves preclusion of race discrimination claims in non-Section 706 "administrative proceedings."

The *Carlisle* decision did not turn on whether the individual (via the Tenure Commission) or the school board appealed into state court. However, the fact scenario of an administrative agency controlling the "choice" of exercising final administrative review in state court and preventing Title VII *de novo* trial in federal court, by the employer's appeal into state court, only illustrates the further potential for inequity and undermining of Title VII.

Most likely, aggrieved parties are going just straight into federal court to file Title VII claims without taking a chance of preclusion with state Section 706 or non-Section 706 "administrative proceedings."

The Tenth Circuit application of *Kremer* (and *Kremer* itself) is a "death trap" to fundamental rights, emphasizing "form over substance" and petty gamesmanship, toying with important Constitutional and Congressional protection against racial discrimination. Even within Section 706 agency proceedings, under *Kremer* the claimant is encouraged to avoid state court by dropping the final step of non-*de novo* state court review, not exhausting state "administrative proceedings," where many cases might yet be resolved. And worse, terminated employees are discouraged from contesting discharge in *any* administrative manner whatsoever, by internal grievance procedures concerning "terms and conditions" of employment, or from attempting to obtain unemployment compensation, becoming "trigger happy" with their counsel to obtain the EEOC "right to sue" letter and file

the Title VII and Section 1983 Equal Protection claims in federal court, ruling out relief at the local level.

Kremer, if it *does* apply to non-Section 706 agencies, should be overturned as violative of Title VII with its overlapping scheme of protection including *de novo* trial in federal court. *Kremer* encourages litigants not to exhaust their state remedies before entering the federal forum, thus contradicting the important principle and policy of "exhaustion of remedies."

Kremer can be reversed without inequity or damage to our legal system: Title VII and *McDonald, supra*, would have the full force and effect that they were meant to have if not only the Tenth Circuit's decision but *Kremer* were reversed. *See Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2808-09 (1992), regarding *stare decisis* factors, which weigh in favor of reversing *Kremer*. If *Kremer* were overturned, more cases would likely be brought to resolution at the state level, and the guaranteed safety net of Title VII *de novo* trial in federal court (or at the very least *de novo* trial in state court where the state Section 706 statutory scheme provides for same) would still exist to rid society of the evil of racial discrimination.

The policy of *Kremer* flies in the face of repose of litigation. As it stands, litigants are guaranteed a full-blown adversarial hearing at the administrative level (*one "bite at the apple"*), and if they cleverly avoid the last step of "administrative proceedings," *i.e.*, state court non-*de novo* review, they can then jump into federal court for a Title VII trial *de novo* (*a second "bite at the apple"*). And, presumably, a successful Section 706 litigant may pursue

additional relief (such as Title 42 U.S.C. Section 1988 attorney fees) in federal court anyway. The majority in *Kremer* did not fix the problem it perceived, nor did it foster comity, federalism, or the principle of "exhaustion of remedies," instead it created and left more unanswered problems and conflict with the ideals of repose, res judicata, collateral estoppel, federalism and comity than met the surface, while at the same time eroding Title VII protection against race discrimination.

The Supreme Court was deeply divided over the issues in *Kremer*. The 5-4 majority opinion, authored by Justice White, was joined by Chief Justice Burger, and Justices Powell, Renquist and O'Connor. Justice Blackmun wrote a dissenting opinion, in which Justices Brennan and Marshall joined. Justice Stevens wrote a separate dissenting opinion.

Commentary likewise uniformly criticizes the majority's decision in *Kremer*.[2] *See e.g.*, Note, A Tragi-Comity:

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[2] "The majority opinion in *Kremer* has generated a plethora of commentary. . . . See, e.g., Note, Res Judicata, Collateral Estoppel, and Title VII: Tool or Trap for the Unwary?, 62 Neb.L.Rev. 384 (1983); Jackson, Matheson & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich.L.Rev. 1485 (1981) (criticizing the result in *Kremer* prior to the Supreme Court's decision). See also Catania, State Employment Discrimination Remedies and Pendant Jurisdiction under Title VII: Access to Federal Courts, 32 Am.U.L.Rev. 777 (1983) (suggesting invocation of pendant jurisdiction as solution to *Kremer*'s threat to judicial determination of discrimination claims); Comment, Res Judicata in Successive Employment Discrimination Suits, 1980 U.Ill.L.F. 1049." Mann, Federalism Issues and Title VII: Kremer v. Chemical Construction Corp., Vol XIII New York University Review of Law &

Kremer v. Chemical Construction Corp., 15 Conn.L.Rev. 799, 811, 815-16, 819 (Summer 1983):

> Justice Blackmun noted three disturbing consequences of the Court's decision. First, unsuccessful claimants in state discrimination actions will avoid judicial review of the state agency judgment so as not to foreclose the opportunity for a new hearing on the merits. Second, . . . *pro se* or poorly represented complainants might find themselves barred from the federal courtroom by following normal state appellate procedure. Finally, even a successful employment discrimination claimant may be brought into state court through his opponent's filing of an appeal. * * * *Although the Court purports to promote comity and federalism, the actual result of its Kremer decision . . . [is] inimical to those concepts.* Barring from federal court Title VII litigants who appeal adverse agency decisions in state court discourages the full utilization of the state forum. *Because litigants can obtain a full hearing on the merits in federal court, it is unlikely that they will be willing to foreclose their federal court option by submitting their claim to a deferential review in the state courts.* * * * In addition to undermining the Court's concern for comity, *the Kremer decision also contravenes Congressional intent [behind enactment of Title VII]. As Justice Blackmun noted, Congress wished to involve the states as fully as*

Social Change 411, 412 (1984-85). *See also:* Wolterman, If You Do Not Succeed At First Do Not Bother Trying Again: Should Res Judicata Principles Prevent Title VII Claims That Are Unreviewed By The State From Proceeding To Federal Court?, 54 Cincinnati L.Rev. 649 (1985); Case Note, Kremer v. Chemical Construction Corporation: Eviscerating Title VII, Vol. XVII Suffolk U.L.Rev. 987 (Winter 1983); and Weeden, The Effect of Section 706 State Agency Proceedings Upon Subsequent Title VII Claims, 14 North Carolina Central L.J. 473 (Spring 1984).

possible in enforcing employment discrimination laws, while at the same time assuring litigants a judicial forum to present their claims with the full benefit of discovery and other procedural safeguards. * * * ***The [Kremer majority's] concern for issues of comity and federalism can be addressed through strict application of res judicata principles. There is no affront to a state court when a federal court refuses to grant preclusive effect to a question not litigated [de novo] before the state court.*** * * * ***Paradoxically, the Court's concern for comity leads to a result that undermines state involvement in enforcing employment discrimination laws and deprives Title VII litigants of the full panoply of procedural safeguards that Congress intended to provide.*** *The Court could have used alternative approaches that would have given effect to its concern for comity while preserving competing federal policies.* (Emph. Supp.)

CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 10, 1993

APPENDIX A

Unpublished Tenth Circuit Court of Appeals Order And Judgment, No. 91-2294 (Aug. 13, 1993)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CARLOTTA MITCHELL, Plaintiff-Appellant, v. ALBUQUERQUE BOARD OF EDUCATION, doing business as Albuquerque Public Schools, LILLIAN BARNA, JOE GROOM, and JOHN MONDRAGON, Defendants-Appellees.	No. 91-2294 (D.C. No. CIV-86-1184-JB) (D.N.M.)

ORDER AND JUDGMENT*

(Filed Aug. 13, 1993)

Before McKAY, Chief Judge, SETH and MOORE, Circuit Judges.

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Plaintiff Carlotta Mitchell challenges the granting of summary judgment by the United States District Court for the District of New Mexico wherein the court determined that Plaintiff was collaterally estopped from litigating her Title VII and 42 U.S.C. §§ 1983 and 1985 claims against Defendants Albuquerque Board of Education, doing business as Albuquerque Public Schools, Joe Groom, John Mondragon, and Lillian Barna. Based upon the unique facts of this case, we affirm in part and reverse in part.

Plaintiff, who is African-American, was a teacher at an Albuquerque public school. It is uncontested that during her tenure at the school she was outwardly opposed to the school's "mainstreaming" policy of integrating special students into regular classrooms. In addition, complaints were filed by several parents concerning Plaintiff's allegedly abusive behavior towards students and themselves. Although Plaintiff claimed that these complaints were fallacious and racially motivated, Defendant Joe Groom, her principal, instructed her to submit a written improvement plan addressing her opposition to "mainstreaming" and the complaints lodged by the parents. After receiving several unsatisfactory reports from Plaintiff over a six-month period, Mr. Groom suspended Plaintiff for insubordination. This suspension was followed by a discharge letter sent by Defendant Lillian Barna, Superintendent of the Albuquerque Public Schools.

Thereafter, Plaintiff was provided an adversarial hearing before the Albuquerque Public Schools Board of Education ("local board") pursuant to the then-applicable

statute, N.M. Stat. Ann. §§ 22-10-17 and 22-10-19 (Repl. 1984). Plaintiff was represented by counsel throughout the hearing which lasted eight sessions totalling approximately forty hours. During the hearing twenty-four witnesses were examined, of which eleven were called by Plaintiff, and over sixty exhibits were offered. The local board voted unanimously to uphold Plaintiff's termination, finding that her "repeated refusals to comply with the lawful order of her principal constituted insubordination which was good and just cause for her termination." Record on Appeal, Vol. II, Doc. 17, Appendix "E", at 7.

Plaintiff appealed the decision to the New Mexico State Board of Education ("SBE") pursuant to N.M. Stat. Ann. § 22-10-20 (Repl. 1984). By stipulation the appeal was conducted by an independent hearing officer upon a full review of the transcript of the local board hearing, briefs submitted by both parties and oral argument before the SBE. The hearing officer entered recommended findings of fact and conclusions of law upholding the local board's decision. After a hearing that Plaintiff did not attend despite receiving notice, the SBE adopted the hearing officer's recommendations.

The SBE decision was then appealed to the New Mexico Court of Appeals which in turn upheld Plaintiff's termination. Specifically, the court found that Plaintiff failed to prove that the SBE decision was not in accordance with the law or that there was any other reversible error.

During this appeals process, Plaintiff filed two separate civil suits. First, after obtaining a right to sue letter from the E.E.O.C., she filed a complaint in the United

States District Court for the District of New Mexico primarily claiming that Mr. Groom and Superintendent Barna violated Title VII, 42 U.S.C. § 2000(e). The gist of her complaint was that Mr. Groom's request that she submit an improvement plan was an improper disciplinary action that was in fact a pretext for discrimination because both he and some students' parents wanted to oust her from the school due to her race. Plaintiff also made a vague assertion that Superintendent Barna illegally retaliated against her for instituting the appeal before the SBE by officially upholding her termination. Just prior to the decision by the state court of appeals affirming the SBE decision, Plaintiff sued in state district court claiming that the above described conduct by Mr. Groom and the local board, including Superintendent Barna, violated her civil rights protected by 42 U.S.C. §§ 1983 and 1985. In particular she claimed that her equal protection right to be free from racial discrimination and her First Amendment right to free speech concerning mainstreaming were illegally abridged by Defendants. These two cases were later consolidated in federal district court.

Subsequently, Defendants filed a motion for summary judgment claiming that Plaintiff's Title VII and civil rights claims were barred by the doctrines of administrative res judicata and collateral estoppel. Defendants argued that the findings by the local board and SBE that Plaintiff was fired for good and just cause, and the affirmance of those findings by the state court of appeals, necessarily foreclose Plaintiff's contentions that her termination was racially motivated and violated her right to free speech.

Although admitting that "she was terminated for insubordination," Plaintiff argued in her response to Defendants' motion that she was denied a full and fair opportunity to litigate her discrimination and First Amendment claims because the local board was biased and she lacked subpoena power to compel the attendance of several unnamed witnesses. Record on Appeal, Vol. I, Doc. 65. In addition, she argued that neither res judicata nor collateral estoppel were applicable because a finding that there was just cause for her firing does not necessarily mean that her race was not a contributing factor to her termination nor that her discrimination claims were actually litigated at the state level. *Id.*

In a decision delivered from the bench, the district court granted

> "the motion for summary judgment on the basis of the doctrine of issue of preclusion [collateral estoppel] applies to administrative agency's findings of fact regarding the claims. And also further that even though there are some affidavits attached before the Court, the Court does not find that plaintiff's response to the defendant's motion for summary judgment raises any genuine issues of material fact."

Record on Appeal, Supp. Vol. II, at 28. However, it appears that the district court also intended to base its decision on the doctrine of res judicata. This has led to some confusion among the parties as to what doctrine the court actually applied.

In order to focus our review of this matter, we note that res judicata is inapplicable to this case because the causes of action sued upon are different, i.e., Plaintiff's

administrative appeals of her termination are not identical to her Title VII and civil rights lawsuits even though the underlying facts are similar. *See* Silva v. State of New Mexico, 745 P.2d 380, 382 (N.M.) ("When the duty sued upon stems from different roots in the prior and subsequent actions, even if both actions involve essentially the same course of wrongful conduct, it is indicated that the suits arise from different causes of action."); Tolefree v. Kansas City, Mo., 964 F.2d 803 (8th Cir.) (administrative challenge to dismissal is not identical to discrimination claims for purposes of res judicata).

The sole issue before this court is whether the district court properly granted summary judgment based on its determination that collateral estoppel operates to bar Plaintiff's Title VII and civil rights claims. We review the order of summary judgment de novo in the light most favorable to the nonmoving party. Thournir v. Meyer, 909 F.2d 408 (10th Cir.).

28 U.S.C. § 1738 requires federal courts to give a state court judgment the same preclusive effect as the state rendering the judgment would have given. Kremer v. Chemical Constr. Co., 456 U.S. 461, 466; Scroggins v. State of Kansas, 802 F.2d 1289, 1291 (10th Cir.). In looking to New Mexico law, we find that a moving party must demonstrate that:

> "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. If the movant

> introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation."

Shovelin v. Central New Mexico Electric Cooperative, 850 P.2d 996, 1000 (N.M.) (citations omitted).

On appeal Plaintiff challenges the district court's application of collateral estoppel to bar her various claims. There is no dispute that the first part of the collateral estoppel test is satisfied, and we have already determined that the pertinent causes of action are different. Thus we are only concerned with Plaintiff's arguments that her discrimination and civil rights claims have not been actually litigated and necessarily decided and that genuine issues of material fact remain concerning whether she was denied a full and fair opportunity to litigate at the state level.

We first address the collateral estoppel dispute in relation to Plaintiff's Title VII and related §§ 1983 and 1985 claims as they are factually indistinguishable. As we understand Plaintiff's complaints, the determinative issue underlying her various discrimination claims is that Mr. Groom's request for a written improvement plan was a pretext for racial discrimination. This is the issue that Defendants seek to collaterally estop from further litigation.

As noted above, the articulated reason for Plaintiff's termination was insubordination. According to the State Board of Education Regulation 77-1, insubordination requires a finding that Plaintiff willfully disregarded a

lawful order of an administrative authority, e.g., a principal. Before the local board, Plaintiff proffered two theories to support her contention that Mr. Groom's request was unlawful and therefore she was not insubordinate for any failure to respond thereto. First, she claimed that the request did not conform with her employment contract and the various regulations governing teacher discipline. However, she also argued at that time, as admitted in her response to Defendant's motion for summary judgment, that Mr. Groom's request was a pretext for racial discrimination. Consequently, the issue of whether Mr. Groom's request to Plaintiff was racially discriminatory was relevant to both Plaintiff's administrative hearings and her subsequent lawsuits, and was in fact raised in both actions.

We now turn to the third part of the collateral estoppel test to determine if the issue of Mr. Groom's discriminatory conduct was actually litigated. Plaintiff argues for the first time on appeal that even if this issue were raised the local board ignored or otherwise failed to adequately address her discrimination claims. We are not willing to diverge from the general rule that we will not entertain issues that were not considered and ruled upon by the district court. Farmers Ins. Co. v. Hubbard, 869 F.2d 565 (10th Cir.).

In the alternative, Plaintiff asserts that the record presented to the district court was inadequate to support a determination that her discrimination claims were actually litigated. *See Silva*, 745 P.2d at 384 (collateral estoppel is not "to be applied where the record is insufficient to determine what issues were actually and necessarily determined by prior litigation. . . . "). However, in her

response to Defendants' motion for summary judgment, Plaintiff admitted the following salient facts as enumerated in the Defendants' motion:

> "7. In the course of the [local board] hearing, Mitchell contended that the stated reason for her discharge (insubordination) was pretextual and that instead she was really terminated because of racial bias against her.
>
> "9. After hearing all the testimony and considering the evidence, the local board rejected Mitchell's contentions and unanimously voted to terminate her on the grounds of insubordination."

Record on Appeal, Vol. I, Doc. 65, at 1, and Vol. II, Doc. 17, at 2-3. She also stated that her "contention throughout the lower administrative and state court proceeding [was] that her termination was not only pretextural [sic] but was in violation of the applicable regulations and her contract." Record on Appeal, Vol. I, Doc. 65, at 4. These admissions alone demonstrate that there was actual litigation of the principal issue underlying Plaintiff's race discrimination claims. In passing we note that our conclusion that the determinative issue was actually litigated is supported by the local board's decision wherein it weighed all of the evidence and concluded that the reports filed against Plaintiff, which she claimed were racially motivated and untrue, warranted Mr. Groom's request to Plaintiff, i.e., the reports were valid and not racially motivated.

With respect to the fourth part of the collateral estoppel test, Plaintiff argues by inference that the local

board's finding of good and just cause for her termination, i.e., that she was insubordinate, does not necessarily preclude a finding that she was also fired because she is African-American. She maintains that if the local board had found no discrimination, it would have explicitly stated such a resolution in its decision. Unfortunately for Plaintiff, she did in fact argue race discrimination before the local board which was authorized by statute to admit testimony and evidence "on all pertinent issues." N.M. Stat. Ann. § 22-10-19(A) (Repl. 1984). By raising the defense that Mr. Groom's request was unlawful because it was a pretext for race discrimination, Plaintiff focused the local board's review to an essential determination of that issue. *See* Paulos v. Janetakos, 129 P.2d 636 (N.M.). Therefore, the local board's decision that Mr. Groom's request was lawful and that Plaintiff was insubordinate necessarily rejected Plaintiff's claims that the request was discriminatory.

Although we have determined that the key race discrimination issue has been actually litigated and necessarily decided by the local board acting in its quasi-judicial capacity, we recognize for purposes of Title VII, unlike § 1983, that collateral estoppel may be applied under 28 U.S.C. § 1738 only if there has been a prior state court decision. *Kremer,* 456 U.S. 461. *See also* Univ. of Tennessee v. Elliott, 478 U.S. 788 (when an agency acts in a quasi-judicial capacity, its decision is entitled to the same full faith and credit as court decision); Crot v. Byrne, 957 F.2d 394 (7th Cir.) (agency decision collaterally estopped subsequent § 1983 action). In this case Plaintiff appealed to the SBE which affirmed the local board decision. Subsequently, Plaintiff appealed to the state court of

appeals. In that appeal, Plaintiff cited a proposed conclusion of law by the hearing officer that the SBE lacked authorization to address certain matters to support her proposition that the SBE failed to conduct a proper de novo review. In its unpublished decision, the state court of appeals held that the record did not support Plaintiff's proposition.

The court of appeals noted that Plaintiff had filed several grievances with the Albuquerque Teachers Federation claiming, among other things, that Mr. Groom lacked authority to request the improvement plan and was discriminating against her because of race. The court also found that the hearing officer had conducted a review of the local board hearings, which as we have discussed included Plaintiff's claims of pretext and discrimination, and that the officer proposed a finding of fact in which he stated that none of the aforementioned grievances resulted in any relief for Plaintiff. Ultimately, the court concluded:

> "[T]he hearing officer reasoned that Mitchell's behavior was insubordinate if the principal's order was lawful and that the agreement between the teachers union and the school district did not affect the lawfulness of that order. Thus, we understand the [hearing officer's] finding and the conclusion as a rejection of Mitchell's claim that the order was unlawful. For this reason, we are not persuaded that the hearing officer failed to consider Mitchell's contention on its merits.
>
> . . . .
>
> " . . . [Mitchell] has not demonstrated that the State Board's decision was not in accordance

> with law and has not established other reversible error."

The state court of appeals' affirmation of the agency's prior decisions actually and necessarily decided the key issue of whether Mr. Groom's request was lawful and therefore not racially motivated, and consequently it is entitled to full faith and credit in federal court pursuant to the doctrine of collateral estoppel if Plaintiff was accorded a full and fair opportunity to litigate at the state level. *See Kremer*, 456 U.S. 461.

In her response to Defendants' motion for summary judgment, Plaintiff argued that genuine issues of material fact remained relative to her opportunity to fully and fairly litigate her discrimination claims. In particular she argued that the reviewing agencies were biased and that she was unable to subpoena witnesses during her local board hearing. In addition, she claims that the district court ignored countervailing equities as defined in *Silva*, 745 P.2d 380. After carefully examining the record, we can find no evidence supporting these claims. Rather, Plaintiff has made conclusory self-serving statements which are insufficient to create a genuine dispute over material facts. Medina v. City & County of Denver, 960 F.2d 1493 (10th Cir.). Even if there were countervailing equities, we find that they would be clearly outweighed by substantial procedural and substantive due process provided to Plaintiff. *See Kremer*, 456 U.S. at 479-85. In particular, we note the thoroughness of the hearings and subsequent appeals throughout which Plaintiff was represented by counsel.

Unlike Plaintiff's discrimination claims, we find that the disposition of her First Amendment claim is akin to our decision in *Scroggins*, 802 F.2d 1289 (holding that dismissed employee did not have full and fair opportunity to litigate discrimination claims during administrative appeals of his termination). For purposes of clarity we observe that Plaintiff's complaint filed in state court incorrectly cited 42 U.S.C. § 1983, rather than § 1986, as applying to her First Amendment claim that she was retaliated against for opposing mainstreaming at her school, but we will treat her claim as properly pled. It cannot be disputed based on the record before us that absolutely no mention of Plaintiff's First Amendment claim was made any time during the administrative appeal of her termination. This is even more severe than *Scroggins* where there was at least the assertion that race discrimination issues were discussed in excruciating detail. *Scroggins*, 802 F.2d at 1291. It simply cannot be said that Plaintiff's First Amendment claim was actually litigated or necessarily decided when the record is absolutely devoid of any mention thereto.

Accordingly, we AFFIRM the granting of summary judgment by the United States District Court for the District of New Mexico dismissing Plaintiff's Title VII and 42 U.S.C. §§ 1983 and 1985 claims, and we REVERSE the dismissal of her 42 U.S.C. § 1986 First Amendment claim and REMAND for further proceedings consistent with this opinion. IT IS SO ORDERED.

Entered for the Court

Oliver Seth
Circuit Judge

APPENDIX B

U.S. District Court Order And Summary Judgment, Civ. No. 86-1184 JB (Oct. 31, 1991) (including transcript of oral Findings of Fact and Conclusions of Law)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARLOTTA MITCHELL,

Plaintiff,

CIV. NO. 86-1184 JB

vs.

ALBUQUERQUE BOARD OF EDUCATION
d/b/a Albuquerque Public Schools, et al.,

Defendants.

ORDER AND SUMMARY JUDGMENT

(Filed October 31, 1991)

THIS MATTER came on for a hearing on October 29, 1991 on Defendant's motion for summary judgment and the Court having heard the arguments of counsel and having reviewed the submissions of the respective parties, and having made its findings of fact and conclusions of law in open court;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment be, and hereby is, granted.

IT IS FURTHER ORDERED that summary judgment shall be granted in favor of all Defendants, and they shall be dismissed from this action with prejudice.

DATED this 31st day of October, 1991.

/s/ Illegible
Chief Judge

[p. 25] MR. KEY: Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Key.

Well, the following will constitute the Court's findings of fact and conclusions of law. I'll announce my decision from the Bench. I will not prepare a written opinion since I do not believe it will be necessary.

Plaintiff's contention that the State Court of Appeals did not address the merits failed in light of Kramer [sic] versus Chemical Construction Corporation, that case stands for the proposition that 1983, 1985 and 1988 claims are barred by either claim or issue preclusion because they were considered and resolved in administrative proceedings conducted by a state agency acting in a quasi-judicial capacity, and also that plaintiff's Title VII claims are also barred because the findings of the state court agency were reviewed by the State Court of Appeals, which constituted a final judgment on the merits.

Kramer, [sic] as Ms. Bratton properly argues, held that the Federal District Court was required to give preclusive effect to state court decisions upholding the state administrative agency's rejection of a Title VII employment discrimination claim.

The state appellate court's review in Kramer [sic] was limited to whether the claimant was denied procedural rights and whether the board's decision was arbitrary or capricious.

[p. 26] Although it is true that the findings and conclusions of the state board in this case merely state that the actions were – that Mr. Groom's actions were lawful and plaintiff was terminated for just cause, plaintiff litigated the merits of the Federal claims before the local board, and the state board reviewed the entire transcript of those proceedings.

The New Mexico Court of Appeals found that the state court rejected the plaintiff's claim, that the principal's order was lawful, and it also was not persuaded that the hearing officer failed to consider plaintiff's contentions on the merits.

The New Mexico Court of Appeals review was limited to whether the board's action was arbitrary or capricious, not supported by substantial evidence or otherwise not in accordance with law.

Plaintiff could have but did not specifically raise the issue that defendant's were not in accordance with law because they were unconstitutional and in violation of Title VII.

And it is also clear under the law that full and fair opportunity to litigate will be presumed wherever state proceedings satisfy the minimal procedural requirements of the Fourteenth Amendment due process clause. That is also the law as stated by Kramer [sic].

[p. 27] The record shows that plaintiff had notice and an opportunity to be heard. And there is no indication in the record to suggest that the board was biased, nor was that contended at the state appellate level.

Also the plaintiff contends that she did not have subpoena power, but that was statutorily provided as a right, and the right to de novo review at the state board level, but the parties stipulated, as I previously stated, to use the record from the hearing before the local board.

On the basis of the record before this Court, and under the – well, perhaps I should address the issue of preclusion matter, since both sides have argued that.

Under the issue of preclusion under the State of New Mexico, there are certain elements that must be established.

First, the finding of ultimate facts in the first suit must be final. That's been satisfied. Second, different causes of action, and that is also before me.

Three, the issue was actually decided in the first suit. Fourth, the issue was necessarily decided in the first suit. And five, the same parties or privity.

In deciding whether to apply the doctrine of collateral estoppel, the trial judge may determine that its application would be fundamentally unfair and would not further the aim of the doctrine to prevent endless relitigation [p. 28] of issues.

Fundamental fairness requires only that the parties against whom estoppel is asserted has a fair – full and fair opportunity to litigate.

And again, as I've stated, the findings of fact in an unreviewed administrative proceeding have preclusive effect by collateral estoppel in 1983, 1984 and 1988 cases, and that the findings of an administrative agency when reviewed by a state court have the preclusive effect in Title VII.

So the Court will grant the motion for summary judgment on the basis of the doctrine of issue of preclusion applies to administrative agency's findings of fact regarding the claims. And also further that even though there are some affidavits attached before the Court, the Court does not find that plaintiff's response to the defendant's motion for summary judgment raises any genuine issues of material fact.

So therefore the Court will grant the motion for summary judgment in this case, and the Court will enter an appropriate order.

Is there anything else to come before the Court at this time?

Ms. Bratton?

MS. BRATTON: No, sir.

THE COURT: Mr. Key?

APPENDIX C

New Mexico State Court of Appeals Memorandum Opinion (May 10, 1988)

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CARLOTTA MITCHELL,

Appellant,

vs. No. 9543

NEW MEXICO STATE BOARD OF EDUCATION and BOARD OF EDUCATION OF THE ALBUQUERQUE PUBLIC SCHOOLS, a/k/a BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE,

Appellee.

ADMINISTRATIVE APPEAL FROM A DECISION OF THE STATE BOARD OF EDUCATION

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MEMORANDUM OPINION

(Filed May 10, 1988)

MINZNER, Judge.

Carlotta Mitchell (Mitchell) appeals the decision of the State Board of Education (State Board) affirming her dismissal as a teacher with the Albuquerque Public Schools. The reason for her dismissal was insubordination, resulting from her failure to comply with a repeated order from her principal. We affirm.

Mitchell had been employed as an elementary school teacher in the Albuquerque Public Schools for eleven years. Her principal, Joe Groom (Groom), testified that he requested she submit an improvement plan after he received complaints concerning her relationships with parents and students. His request noted problems with parents and students, as well as Mitchell's opposition to "mainstreaming" special education students. He first requested the improvement plan in May, 1985.

The record indicates that Mitchell resisted complying for six months. She requested that Groom supply names of people to help her with the plan, she asked for additional clarification of what was required, and she sought copies of all correspondence relating to the complaints about her. She also filed grievances with the Albuquerque Teachers Federation, claiming that Groom had no authority to request the plan and that she was being discriminated against because of race, sex, and her union activities.

Groom kept extending the deadline for the improvement plan. She was warned several times that if she did

not submit the plan she would be terminated for insubordination. Eventually Mitchell submitted a plan that the hearing officer found did not satisfy the request. She subsequently submitted a plan that outlined ways in which Groom could improve as principal. Finally, in November of 1985, she was suspended from her teaching duties, and on December 27, 1985, she was notified that she was discharged from her employment because of insubordination.

In January of 1986, the Albuquerque School Board (local board) began hearings on the discharge. The hearings spanned several months, with approximately forty hours of testimony. The local board heard testimony from witnesses, including administrators, teachers, and parents. It also admitted some 74 exhibits. On April 2, 1986, the local board upheld the dismissal.

On appeal to the State Board, the parties stipulated that the hearing would be based on the transcripts and exhibits from the hearing before the local board. The State Board's hearing officer considered this evidence and heard argument of counsel for the parties. He then submitted a report and recommended findings of fact and conclusions of law. The State Board entered an order and decision affirming Mitchell's termination for insubordination; the order incorporated the hearing officer's findings and conclusions.

Before this court, Mitchell claims that (1) the State Board's final order was not in conformance with law; (2) the hearing was not a proper de novo review; and (3) the record is insufficient to permit this court to review the

sufficiency of the evidence. This court's review of a decision of the State Board is limited to determining whether it is (1) arbitrary, capricious, or unreasonable; (2) not supported by substantial evidence; or (3) otherwise not in accordance with law. *See* NMSA 1978, § 22-10-20(J) (Repl.Pamp.1984) (repealed by 1986 N.M. Laws, ch. 33, § 33, effective May 21, 1986); *Redman v. Board of Regents of New Mexico School for the Visually Handicapped*, 102 N.M. 234, 693 P.2d 1266 (Ct.App.1984). We understand all three appellate claims as contending the Board's decision is not in accordance with law.

Mitchell first argues that the State Board's decision is not in accordance with law because the written decision of the State Board does not "contain" findings of fact and conclusions of law as required by statute. *See* § 22-10-20(I). However, the State Board's written decision states that the "State Board of Education adopts as its own the Findings of Fact and Conclusions of Law recommended by its hearing officer, and incorporates them herein as though fully set forth."

Mitchell argues that, in the absence of a decision by the Board that sets out those findings and conclusions specifically adopted, this court will be unable to determine whether the Board exercised independent judgment. *See Coulter v. Stewart*, 97 N.M. 616, 642 P.2d 602 (1982). We are not persuaded. Whether the decision restates the findings and conclusions, or incorporates them by reference, it is clear the Board approved the decision of the hearing officer and intended to make that decision its own. *Cf. Moore v. Moore*, 68 N.M. 207, 360 P.2d 394 (1961) (trial court had noted conflicting findings by plaintiff and defendant as "accepted"). That is an independent

conclusion that the local board should be affirmed on the issues to be determined by the State Board. *See* § 22-10-20(G). It satisfies the clear meaning of the statute.

Mitchell concedes that the State Board's regulations permit it to "adopt" the hearing officer's findings and conclusions. This court has affirmed the Board's power to issue regulations appropriate to its adjudicatory functions in reviewing local board actions. *See Redman v. Board of Regents of New Mexico School for the Visually Handicapped.* Apparently the State Board has interpreted the statute and the regulation to permit the practice of incorporating the hearing officer's findings and conclusions by reference. In the absence of a conflict between the regulation and the statute, we will defer to the agency's interpretation of the statute and its own regulation. *Cf. Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,* 101 N.M. 470, 684 P.2d 1135 (1984) (in reviewing any agency decision, the knowledge and experience of state agencies ought to be given deference).

Mitchell also argues that the State Board did not conduct a proper de novo review. She notes that the hearing officer proposed a conclusion that:

> 6. Mitchell's allegations that Groom's directives were in violation of the Agreement between the Board of Education of the Albuquerque Public Schools and the Albuquerque Teachers Federation, Local 1420 (1984-1986) are not matters authorized by statute, regulation or judicial decision to be reviewed by the State Board of Education.

She concludes that the hearing officer failed to conduct a proper review because he viewed Mitchell's claim that

Groom's order was unlawful as beyond the State Board's review. The record does not support this contention.

The review conducted by the State Board's hearing officer included a review of the transcripts of the hearings at the local level. The hearing officer also considered briefs submitted by the parties. He considered Mitchell's argument regarding the agreement and proposed the following finding of fact:

> 22. There is an agreement between the Board of Education of the Albuquerque Public Schools and the Albuquerque Teachers Federation, Local 1420 (1984-1986). Mitchell claimed that Groom's actions in issuing the directive to complete an improvement plan and other conduct by him were violations of this agreement and on at least four separate occasions filed grievances challenging various aspects of his conduct. None of her grievances resulted in rulings or findings granting her relief from the effect of Groom's directive to complete an improvement plan.

In his written decision, the hearing officer reasoned that Mitchell's behavior was insubordinate if the principal's order was lawful and that the agreement between the teachers union and the school district did not affect the lawfulness of that order. Thus, we understand the finding and the conclusion as a rejection of Mitchell's claim that the order was unlawful. For this reason, we are not persuaded that the hearing officer failed to consider Mitchell's contention on its merits.

It is unclear whether Mitchell's third claim on appeal depends in part on a determination by this court that her

second appellate claim has merit. Mitchell appears to argue that the hearing officer also deferred to the local board on matters of fact-finding. The hearing officer conducted a review of the evidence before the local board, in accordance with the parties' stipulation. To the extent Mitchell attempts to argue that the hearing officer should have taken evidence himself, that issue has been waived. *See Board of Educ. of Taos Mun. Schools v. Singleton*, 103 N.M. 722, 712 P.2d 1384 (Ct.App.1985). We have reviewed the hearing officer's report and are not persuaded that he conducted anything other than a de novo review. We note that he states in his written decision that Mitchell denies she was insubordinate but that "[h]er contention is not believable given the strong documentary evidence."

We conclude that appellant has not demonstrated that the State Board's decision was not in accordance with law and has not established other reversible error. Under these circumstances, the decision of the State Board is affirmed. No costs are awarded.

IT IS SO ORDERED.

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Judge

WE CONCUR:

/s/ William W. Bivins
WILLIAM W. BIVINS, Judge

/s/ Lorenzo F. Garcia
LORENZO F. GARCIA, Judge

APPENDIX D

New Mexico State Board of Education Decision And Order (May 30, 1986)

BEFORE THE STATE BOARD OF EDUCATION

CARLOTTA MITCHELL, APPELLANT, VS. BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE, APPELLEE.	)	July 30, 1986

DECISION AND ORDER

This Decision and Order of the State Board of Education is issued pursuant to Section 22-10-20, NMSA 1978 and State Board of Education Regulation No. 78-3 to implement the official action of the State Board of Education in a public meeting duly convened in Santa Fe, New Mexico, on August 22, 1986, after considering the report of its hearing officer and after hearing the presentation by the attorney for the Board of Education of the City of Albuquerque; the Appellant not appearing in person or through her attorney after appropriate notice.

The State Board of Education adopts as its own the Findings of Fact and Conclusions of Law recommended by its hearing officer, and incorporates them herein as though fully set forth. For the reasons contained in said Findings and Conclusions, and pursuant to the official

action of the State Board, it is hereby DECIDED that the State Board has jurisdiction over the parties and the subject matter of this proceeding; that there has not been a prejudicial departure from the procedures required by statute or State Board regulations in the conduct of the original discharge proceeding; that the Board of Education of the City of Albuquerque has established by a preponderance of the evidence presented that sufficient cause existed for its decision to discharge the Appellant from employment.

Accordingly, it is ORDERED that the decision of the Board of Education of the City of Albuquerque be, and hereby is, affirmed, in accordance with this Decision and the Certified School Personnel Act, Section 22-10-1 et. seq., NMSA 1978.

NEW MEXICO STATE
BOARD OF EDUCATION

BY: /s/ Catherine M. Smith
Catherine M. Smith
President

DATE: 8/22/86

BEFORE THE NEW MEXICO STATE
BOARD OF EDUCATION

CARLOTTA MITCHELL,

Appellant,

vs.

THE BOARD OF EDUCATION OF THE
CITY OF ALBUQUERQUE,

Appellee.

HEARING OFFICER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having been heard on June 30, 1986, for the purpose of hearing oral argument only, the Hearing Officer, by agreement of the parties, having read the transcripts of the hearing held before the Board of Education of the Albuquerque Public Schools on January 6 through March 24, 1986, in lieu of holding a hearing de novo, and having reviewed the documentary evidence and the briefs of the parties, hereby recommends that the New Mexico State Board of Education adopt the following findings of fact and conclusions of law:

Findings of Fact

1. Carlotta Mitchell (Mitchell) was a tenured, certified school instructor employed by the Board of Education of the Albuquerque Public Schools (District) pursuant to a valid contract for the school year 1985-86.

2. During the 1985-86 school year, Mitchell taught fifth grade at Bandelier Elementary School (Bandelier) and had taught at that school for 2 previous years, 1 of

those under the direction of Principal Joe Groom (Groom) who was also principal during 1985-86.

3. During the 1984-85 school year several parents of Mitchell's students complained to Groom about the conduct and language of Mitchell involving either their children or themselves.

4. These complaints were submitted to Groom in writing after conferences between him and the respective parents.

5. As a result of these complaints, four children were removed by Groom from Mitchell's class and transferred to other classes.

6. During the 1983-84 and 1984-85 school years, concerns existed amongst some special education teachers at Bandelier and District administrators that Mitchell was not cooperating with the District's policy to integrate special education children into regular education classrooms (mainstreaming).

7. On May 9, 1985, Groom directed Mitchell to prepare an improvement plan related to several areas of concern that he had due to parent complaints about her conduct and his concern about her opposition to his approach to implementing the District's policy on mainstreaming of special education students. The initial deadline for submission of the improvement plan was September 4, 1986.

8. Groom had a reasonable basis for administrative concern about Mitchell's conduct involving parents and students and her attitudes about mainstreaming at Bandelier.

9. On June 17, 1985, Mitchell asked for greater detail regarding Groom's directive to submit an improvement plan.

10. On July 26, 1985, Groom supplied an additional memorandum to Mitchell outlining the format of an acceptable improvement plan.

11. Prior to the deadline of September 4, 1985, Mitchell requested an extension for submission of an improvement plan. Her request was granted, and the deadline was extended to September 18, 1985, with review of the plan with Groom to occur on September 23, 1985.

12. On September 30, 1985, Mitchell submitted a memorandum in response to Groom's May 9th request for an improvement plan. This memorandum response did not contain an improvement plan.

13. By a letter to Mitchell dated September 30, 1985, Groom responded to Mitchell's memorandum dated September 30, 1985 and again directed her to submit an improvement plan. He extended the deadline until October 2, 1985 and advised Mitchell that failure to submit an improvement plan would constitute insubordination which could result in serious disciplinary action.

14. Mitchell failed to submit any further response by October 2, 1985.

15. On October 3, 1985, Mitchell was directed to attend a meeting with Dr. John Mondragon, South Area Superintendent of the District, and others regarding her failure to submit an improvement plan. At this meeting she was again directed to submit an improvement plan

and given a new deadline of October 4, 1985 at 2 p.m. She was informed that failure to submit a plan could result in disciplinary action and she indicated that she understood this.

16. On October 4, 1986 [sic], Mitchell sent Groom a memorandum stating that she could not respond further to the directive to submit an improvement plan.

17. On October 24, 1985, Groom gave Mitchell another written directive to submit an improvement plan by October 25, 1985 at 3 p.m. and warned her that the failure to do so would result in termination of her employment.

18. On October 25, 1985, Mitchell sent Groom a written memorandum, but it did not constitute an improvement plan.

19. On November 1, 1985, and November 4, 1985 Groom responded to Mitchell's memorandum of October 25, 1985 by giving Mitchell additional information on what would constitute an acceptable response to his repeated directives to submit an improvement plan. He directed her to submit an improvement plan by November 15, 1985 and informed her that her failure to do so would be grounds for termination on the basis of insubordination.

20. On November 11 and 15, 1985, Mitchell submitted two documents to Groom, but these documents did not respond to the directives given to her on May 9, July 26, September 30, November 1 and November 4, 1985.

21. Mitchell was suspended from her teaching duties by the District on November 18, 1985, and notified

by the District on December 27, 1985, in writing that she was discharged from her employment for insubordination.

22. There is an agreement between the Board of Education of the Albuquerque Public Schools and the Albuquerque Teachers Federation, Local 1420 (1984-1986). Mitchell claimed that Groom's actions in issuing the directive to complete an improvement plan and other conduct by him were violations of this agreement and on at least four separate occasions filed grievances challenging various aspects of his conduct. None of her grievances resulted in rulings or findings granting her relief from the effect of Groom's directive to complete an improvement plan.

23. The written notice of termination was personally served on Mitchell.

24. The District, by a 4-member panel, held a hearing beginning on January 6, 1986, which continued by stipulation over a number of afternoons and evenings until it was officially closed on March 24, 1986, after a total of 40 hours of testimony and evidence and cross-examination of the District's witnesses.

25. On April 2, 1986, the District's hearing panel rendered a written decision finding good and just cause for Mitchell's discharge and served a copy of the written decision on Mitchell on April 2, 1986.

26. Pursuant to the written decision of April 2, 1986, the District discharged Mitchell officially as of April 2, 1986, and paid her all benefits and wages owed as of that date.

27. Mitchell filed her notice of appeal to the State Board of education within the time limits set by statute and regulations.

28. A *de novo* hearing before the designated hearing officer was held on June 30, 1985 on the appeal from the District to the State Board of Education.

29. The parties through their counsel have filed with the Hearing Officer certain waivers to statutory and regulatory time limits and requirements relating to the conduct of the *de novo* hearing.

Conclusions of Law

1. The State Board of Education (SBE) has jurisdiction over the parties and the subject matter of this appeal.

2. Appropriate waivers have been filed by the parties and all applicable time limits under Section 22-10-20 NMSA 1978 and SBE Regulations 78-3 have been complied with by the parties.

3. SBE Regulation 77-1 is a lawfully promulgated and valid regulation which defines insubordination as:

> . . . actual or implied willful refusal to follow written policies, rules or procedures established by the State Board of Education, the local school board, or administrative authorities, or the lawful written or oral orders, requests or instructions of administrative authorities, including, but not limited to, those procedures established for the administration or infliction of corporal punishment.

4. Mitchell's failure to submit an improvement plan responsive to the directives of her principal constituted an actual, willful refusal to follow a written order and instruction of an administrative authority.

5. The directives of Mitchell's principal that she prepare an improvement plan were lawful orders or instructions within the meaning of SBE regulation 77-1.

6. Mitchell's allegations that Groom's directives were in violation of the Agreement between the Board of Education of the Albuquerque Public Schools and the Albuquerque Teachers Federation, Local 1420 (1984-1986) are not matters authorized by statute, regulation or judicial decision to be reviewed by the State Board of Education.

7. Mitchell's actions during September, October and November, 1985 constitute insubordination and are good and just cause for discharge and the issuance of a new contract by the District to reemploy Mitchell for the 1985-86 school year did not restrict the District's ability to discharge Mitchell during the 1985-86 school year.

8. There has been no prejudicial departure from the procedures required by statute or the regulations of the State Board of Education.

9. The District has established by a preponderance of the evidence that insubordination existed and that there was good and just cause to discharge Mitchell.

10. The decision of the District to discharge Mitchell should be affirmed.

Respectfully submitted,

/s/ Mark D. Bennett
Mark D. Bennett
Hearing Officer

Date: July 30, 1986

APPENDIX E

Board of Education, Albuquerque Public Schools
Decision (April 2, 1986)

BEFORE THE BOARD OF EDUCATION
ALBUQUERQUE PUBLIC SCHOOLS

LILLIAN BARNA, Superintendent,
ALBUQUERQUE PUBLIC SCHOOLS,

Complainant,

vs.

CARLOTTA MITCHELL,

Respondent.

DECISION

(Filed April 2, 1986)

This decision is reached after an informal hearing before the Board of Education – Albuquerque Public Schools conducted pursuant to and in accordance with the requirements of §22-10-17 and §22-10-19 N.M.S.A. (1978 Comp.) and State Board of Education Regulation No. 75-10. The hearing commenced on January 6, 1986 and continued on eight afternoons and/or evenings until March 24, 1986. Board members devoted in excess of 40 hours of their time to hearing the testimony and arguments of the parties and the parties' witnesses. Each party presented their witnesses, and each witness was examined and cross-examined. No party was prohibited from presenting their complete case. Neither party was prejudiced.

The issue before the Board was whether Complainant Lillian Barna discharged Respondent Carlotta Mitchell for good and just cause consistent with §22-10-17 N.M.S.A. (1978 Comp.), State Board of Regulation No. 77-1, and applicable case law. §22-10-17(D) N.M.S.A. (1978 Comp.) mandates that a local school board can discharge or, in effect, affirm the discharge of a certified school teacher if it finds "cause for discharging the person pursuant to the employment contract with the person or finding any other good and just cause for discharging the person." The statute does *not* limit good and just cause to insubordination.

If insubordination is the basis for good and just cause, State Board of Education Regulation No. 77-1 defines insubordination as:

> "actual or implied willful refusal to follow written policies, rules or procedures established by the State Board of Education, the local school board, or administrative authorities, or the lawful written or oral orders, requests or instructions of administrative authorities, including, but not limited to, those procedures established for the administration or infliction of corporal punishment."

New Mexico courts, however, have defined insubordination somewhat more broadly as being conduct which manifests "disobedience of orders, infraction of rules, or a generally disaffected attitude toward authority . . . " *McAlister v. New Mexico State Board of Education*, 82 N.M. 731, 732 (Ct. App., 1971). This definition is within the education context.

On December 27, 1985, Ms. Mitchell was discharged for insubordination. This reason for discharge was contained in a letter from Superintendent Barna to Carlotta Mitchell dated December 27, 1985. The letter of discharge was sufficient to initiate discharge as it conformed with §22-10-17(A & B) N.M.S.A. (1978 Comp.) and State Board of Education Regulation No. 75-10 IB.

The reason for discharge as stated in the letter conforms with statute and regulation in that it is a "clear and concise statement of the alleged cause or causes for discharging the person." It is for the parties to further elaborate or explain those reasons at the informal hearing before the Board, and each party exhaustively did so for the duration in excess of forty (40) hours before the Board. In the course of this hearing, Ms. Mitchell received more than a sufficient quantum of the due process to which she is entitled. *Cleveland Bd. of Education v. Loudermill,* ___ U.S. ___, 118 LRRM 3041 (1985). Consistent with *Loudermill,* Ms. Mitchell as a tenured public employee was entitled to oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to present her side of the story. Ms. Mitchell received due process appropriate to the nature of her case.

Returning to the issue before the Board of whether Superintendent Barna discharged Carlotta Mitchell for good and just cause, the Board holds, based on the proponderence of the evidence, that Ms. Mitchell was discharged for good and just cause and by so holding confirms Ms. Barna's discharge of Ms. Mitchell. In so holding, the Board rejects testimony and evidence of Ms.

Mitchell's conduct for school years previous to the current 1985-86 school year except insofar as that conduct establishes Ms. Mitchell's knowledge that she was required to abide by and follow the rules, procedures, orders, requests, or instructions of her administrative authorities, including her principal, consistent with *McAlister v. New Mexico State Board of Education, supra.*

Also in rendering its holding, the Board recognizes that the instant matter is not an "uncorrected unsatisfactory work performance" case as described in State Board of Education Regulation No. 77-1 IV. The Board, however, does re-emphasize that the issue in the instant matter is good and just cause which is broader than simply insubordination as allowed by statute and regulation. Insubordination, however, does constitute good and just cause for discharge. Defiance of supervisory authority is equated with insubordination.

Turning then to Ms. Mitchell's conduct which was sufficient to constitute good and just cause for discharge, the Board notes the following: On May 9, 1985 Ms. Mitchell's principal, Joe Groom, via written memorandum instructed Ms. Mitchell to develop an improvement plan in three specified areas; (1) mainstreaming, (2) parent communications, and (3) student relationships. His memorandum was based on a number of complaints by or incidents involving students, parents, and teachers respecting Ms. Mitchell's attitude and approaches to teaching. The Board weighed the evidence and felt that multiple and disconnected persons associated with Bandelier had come forth with reports of experiences warranting improvement in the three areas specified.

Based on his perceptions, Mr. Groom's instruction to Ms. Mitchell to prepare an improvement plan was appropriate and was a lawful order of an administrative authority. The instruction requested that Ms. Mitchell submit the plan by September 4, 1985, and Mr. Groom offered to help Ms. Mitchell prepare the plan or put her in touch with people who could help her prepare the plan. Subsequent to May 9, 1985, Mr. Groom supplied Ms. Mitchell with the names of people who could assist her. On July 26, 1985, Mr. Groom in a written memorandum to Ms. Mitchell outlined the format of an acceptable improvement plan.

Prior to September 4, 1985 Ms. Mitchell requested an extension for submission of the improvement plan. Her request was granted, and the deadline was extended to September 18, 1985, with review to occur on September 23, 1985. Both September 18 and September 23 passed without Ms. Mitchell submitting the plan.

On September 30, 1985 Ms. Mitchell responded to Mr. Groom's memo of May 9, 1985. This response was not an improvement plan as instructed.

On September 30, 1985 Mr. Groom again extended the deadline for submission of the improvement plan, this time until October 2, 1985, and advised Mr. [sic] Mitchell that failure to submit an improvement plan would constitute "gross insubordination" so as to subject her to "strong disciplinary action". Ms. Mitchell did not submit a plan by October 2, 1985.

On October 3, 1985 Ms. Mitchell was directed to attend a meeting with Dr. John Mondragon and others respecting her failure to submit an improvement plan.

Ms. Mitchell attended this meeting, commencing at 3:12 p.m. on October 3, 1985. At this meeting the seriousness of Ms. Mitchell's failure to comply with Mr. Groom's order was discussed with Ms. Mitchell, and she acknowledged that she understood the consequences of her actions. At the October 3, 1985 meeting, Ms. Mitchell was given another extension until October 4, 1985 at 2:00 p.m. to present an improvement plan. She failed to submit a plan.

On October 24, 1985, by written memo, Mr. Groom gave Ms. Mitchell a further extension of time until October 25, 1985 at 3:00 p.m. to submit an improvement plan and advised Ms. Mitchell that failure to do so would result in "termination of your employment." On October 25, 1985 Ms. Mitchell responded to Mr. Groom with a memorandum which was wholly unresponsive to Mr. Groom's request for a plan.

On November 1, 1985 Mr. Groom responded to Ms. Mitchell's memo of October 25, 1985 by further outlining the requirements of an improvement plan and requesting that Ms. Mitchell submit such a plan by November 15, 1985, and that her failure to do so would "be grounds for termination on the basis of insubordination."

On November 15, 1985 Ms. Mitchell submitted a document entitled "Improvement Plan", but this plan was a plan of suggested actions which Mr. Groom should take rather than an improvement plan for Ms. Mitchell. The submission of November 15, 1985 was wholly unresponsive to Mr. Groom's request and was an insolent and insubordinate response by Ms. Mitchell.

On November 18, 1985 Ms. Mitchell was suspended by Mr. Groom for continued insubordination. Her employment with APS was terminated on December 27, 1985 for those same reasons.

Ms. Mitchell's repeated refusals to comply with the lawful order of her principal constituted insubordination which was good and just cause for her termination. Ms. Mitchell's discharge of December 27, 1985 is confirmed.

Date: April 2, 1986

BOARD OF EDUCATION
ALBUQUERQUE PUBLIC
SCHOOLS

/s/ Ira Robinson
IRA ROBINSON, Member

/s/ Lenore Wolfe
LENORE WOLFE, Secretary

/s/ Susanne Brown
SUSANNE BROWN, Member

/s/ Mark Sanchez
MARK SANCHEZ, Member

If either party chooses to appeal this decision, the party has a right of appeal to the State Board of Education pursuant to the provisions of §22-10-20 N.M.S.A. (1978 Comp.). A party wishing to appeal must do so in writing by filing a notice of appeal and request for hearing with the State Board of Education within thirty (30) days from the date the party receives the above written decision by this Board.

APPENDIX F

Complaint For Violation Of Civil Rights, U.S. District Court (Sept. 26, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARLOTTA MITCHELL,

Plaintiff,

vs. No. CIV 86-1184M

BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE, d/b/a ALBUQUERQUE PUBLIC SCHOOLS, LILLIAN BARNA, and JOE GROOM,

Defendants.

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

(Filed Sept. 26, 1986)

The Plaintiff, by and through her counsel of record, for her Complaint against Defendant states:

GENERAL ALLEGATIONS

1. The Plaintiff is a resident of the City of Albuquerque, the Defendant Joe Groom is a resident of the City of Albuquerque and an employee of the Defendant Board of Education of the City of Albuquerque d/b/a Albuquerque Public Schools which is a subdivision of the State of New Mexico, being a local governmental entity.

2. This suit is brought under the Act of Congress known as the "Civil Rights Act of 1984", also known as Title VII, 42 USC 2000(e) et seq. providing for injunctive and other relief against descrimination [sic] in employment based upon race and for retaliation in employment for filing complaints of unlawful descrimination [sic] based upon race.

3. The Plaintiff is a person of black heritage.

4. More than 180 days prior to the institution of this lawsuit the Plaintiff filed a charge of unlawful descrimination [sic] in employment with the Equal Opportunity Commission.

5. Within the 90 days preceding the filing of this Complaint the Plaintiff received her notice of right to sue from the Department of Justice.

6. The Plaintiff has exhausted her administrative remedies and all conditions precedent to the institution of this action have been fulfilled.

COUNT I

7. At all times material hereto, the Plaintiff was a tenured school teacher and an employee of the Defendant.

8. At all times material hereto, the Defendant Joe Groom was the immediate supervisor of the Plaintiff and the administrator employed by the Defendant APS with administrative responsibility over the Bandelier School.

9. At all times material hereto, the employment relationship between the Plaintiff and APS was governed

by a collective bargaining agreement negotiated between the parties.

10. The Plaintiff was the only teacher of black heritage employed at the Bandelier School, and there had been no other black person employed at the Bandelier School in recent memory.

11. Several parents of children enrolled in the Bandelier School were racially prejudiced against the Plaintiff and did not wish to have a black person employed in a position of authority at Bandelier School.

12. As a result of the above-referenced racial animus, a number of complaints were lodged against the Plaintiff by parents of children enrolled at Bandelier School to the school administrator, Defendant Groom.

13. In response to the parental complaints, the Defendant Groom attempted to encourage the Plaintiff to transfer to another school; when his efforts to encourage the Plaintiff to transfer failed, the Defendant Groom attempted to force the Plaintiff to transfer to another school.

14. Upon the receipt of parental complaints, the duty of the Defendant Groom and the duty of the Defendant APS, through its agents and employees, was to fairly and impartially investigate the parental complaints in order to determine whether they were true.

15. The Defendants failed to investigate the complaints lodged against the Plaintiff and accepted their truthfulness at face value.

16. The complaints against the Plaintiff were false and were motivated by racism.

17. As a pretext to force the transfer of the Plaintiff from Bandelier School, the Defendant Groom issued an unlawful order to the Plaintiff to prepare an improvement plan relating to the parental complaints.

18. In addition, and as a pretext to force the transfer of the Plaintiff, Joe Groom also requested an improvement plan relating to the implementation of a program known as mainstreaming at Bandelier School despite the fact that the Plaintiff had participated in the mainstreaming efforts.

19. The order for an improvement plan was not a lawful order of Mr. Groom because the collective bargaining agreement referred to above called for a different procedure known an intensive evaluation.

20. The intensive evaluation was the sole lawful procedure available to the Defendants under the circumstances presented above.

21. The Plaintiff attempted in good faith to respond to the improvement plan and did so on a number of occasions.

22. No efforts of the Plaintiff were acceptable to the Defendant Groom, nor indeed could any efforts of the Plaintiff be acceptable to the Defendant Groom because the improvement plan was a pretext to cause her removal from the School.

23. The Defendant Groom knew that the parental complaints brought against the Plaintiff were unfounded.

24. The acts and ommissions [sic] complained of herein constitute descrimination [sic] against the Plaintiff in the terms and conditions of her employment with the

Defendant APS based upon her race in violation of 42 USC § 2000(e) et. seq.

25. As a proximate result of the conduct of the Defendants Barna and Board of Education, the Plaintiff has suffered emotional distress, anxiety, humiliation and embarrassment, and a violation of her constitutional rights.

WHEREFORE, the Plaintiff prays for judgement over and against the Defendants for the Plaintiff's lost wages, her attorney's fees incurred in defending herself before an administrative hearing at the local and state board levels, her future lost earnings, her costs incurred herein, for an order reinstating her to her former employment, for punitive damages against the Defendants in an amount sufficient to punish them and to deter others from similar conduct, for her attorney's fees incurred herein, and for such other and further relief as the court deems appropriate.

COUNT II

26. Plaintiff realleges each preceding paragraph and incorporates by reference each subsequent paragraph of this Complaint.

27. Through the use of the grievance procedure, the Plaintiff complained that the Defendants were violating her constitutional rights to be free from descrimination [sic] based on her race.

28. At the administrative hearing before the Albuquerque Public School Board, the Plaintiff complained

that the Defendants were descriminating [sic] against her because of her race.

29. In retaliation against the Plaintiff for asserting her right to be free from racial descrimination [sic], the Defendant Lillian Barna caused the termination of the Plaintiff's wages and associated fringe benefits in violation 22-10-8, NMSA, as amended.

30. The Defendant Barna, at all times material hereto, was an agent and employee of the Defendant Board of Education, d/b/a Albuquerque Public Schools and was acting in the scope and furtherance of her employment.

31. The Defendant Barna acted with malice and intentionally violated the Plaintiff's contract of employment for the purpose of retaliating against her for asserting her right to be free from racial descrimination [sic].

32. As a proximate result of the conduct of the Defendants Barna and Board of Education, the Plaintiff has suffered emotional distress, anxiety, humiliation and embarrassment, and a violation of her constitutional rights.

WHEREFORE, the Plaintiff prays for compensatory damages and punitive damages over and against the Defendants an in amount sufficient to punish the Defendants and to deter others from similar conduct, for her costs incurred herein, her reasonable attorney's fees

incurred in this action, and for such other and further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Illegible
CHRIS KEY
Attorney for Plaintiff
211 Twelfth Street N. W.
Albuquerque, New Mexico 87102
(505) 242-9097

APPENDIX G

Section 22-10-20 NMSA 1978 (Repl. 1984). Appeals to the State Board [of Education, and review by the State Court of Appeals]

A. A certified school instructor or certified school administrator aggrieved by a decision of a local school board or a certified school instructor aggrieved by a decision of the governing authority of a state agency after an informal hearing conducted pursuant to Section 22-10-19 NMSA 1978 may appeal to the state board. A written notice of appeal and request for hearing shall be filed with the state board within thirty days from the date a written copy of the decision of the local school board or the governing authority of the state agency is served upon the person making the appeal.

B. Within ten days from the date of the filing of a notice of appeal and request for hearing, the state board shall notify the local school board or the governing authority of the state agency of the appeal. Within ten days from the receipt of notice of appeal, the local school board or the governing authority of the state agency shall file with the state board copies of the notice of termination or discharge and the decision from which an appeal is taken.

C. Appeals from the decision of the local school board or the governing authority of the state agency shall be decided after a de novo hearing before the state board. The state board may designate a hearing officer to conduct the de novo hearing. If a hearing officer is designated, he shall make a formal report to the state board,

and, thereafter, the state board shall render a final decision in writing. No person who serves as an attorney for either the state of New Mexico or the department of education or who represents or whose firm represents any local school board, educational institution or school employee organization shall be designated to serve as a hearing officer under this section.

D. The de novo hearing shall be held within sixty days from the receipt by the state board of the notice of appeal. At least thirty days prior to the date of the hearing, the state board shall give written notice of the date, time and place of the hearing and the name and address of the hearing officer if a hearing officer is to conduct the hearing, and such notice shall be sent to the person making the appeal and to the local school board or the governing authority of the state agency from the decision of which the person is appealing.

E. The Rules of Civil Procedure shall not apply to the de novo hearing, but it shall be conducted so that both complaints and defenses are amply and fairly presented. To this end, the state board or its designated hearing officer shall permit any party to call and examine witnesses, cross-examine witnesses and introduce exhibits. The technical rules of evidence shall not apply, but, in ruling on the admissibility of evidence, the state board or the hearing officer may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt.

F. A record shall be made of the hearing which shall be transcribed if there is an appeal to the court of

appeals. Costs of such transcripts, including one copy for the state board, shall be paid by the appealing party.

G. The issues to be determined by the state board are as follows:

(1) whether there has been a prejudicial departure from the procedures required by statute or regulation of the state board; or

(2) whether the local school board or the governing authority of the state agency has established, by a preponderance of the evidence presented, that sufficient cause existed for its decision.

H. The state board or its designated hearing officer may require that written briefs be submitted for consideration by the state board.

I. The state board shall render a written decision affirming or reversing the action of the local school board or the governing authority of the state agency. The decision shall contain findings of fact and conclusions of law. A written copy of the decision shall be served on all parties to the proceeding within sixty days from the date of the de novo hearing. Service of the written copy of the decision shall be in accordance with the law for service of process in civil actions or by certified mail to the party's address of record. For the purposes of this section, mailing of the written copy of the decision by certified mail, return receipt requested, shall constitute service after ten days from the date of the mailing.

J. Any party aggrieved by the decision of the state board pursuant to this section may appeal the decision to the court of appeals by filing a notice of appeal with the

clerk of the court within thirty days after the service of a written copy of the decision of the state board on the party. Upon appeal, the court of appeals shall affirm the decision of the state board unless the decision is found to be:

(1) arbitrary, capricious or unreasonable;

(2) not supported by substantial evidence; or

(3) otherwise not in accordance with law.

APPENDIX H

Excerpts from Appellant's Opening Brief, Tenth Circuit Court of Appeals, No. 91-2294 (Feb. 28, 1992)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARLOTTA MITCHELL, Plaintiff-Appellant, v. BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE, JOE GROOM, JOHN MONDRAGON, LILLIAN BARNA and ALBUQUERQUE PUBLIC SCHOOLS, Defendants-Appellees.	)	No. 91-2294

On Appeal From the United States District Court
for the District of New Mexico

The Honorable Juan Burciaga
District Judge

CIV 86-1084 JB & CIV 88-615 JB

APPELLANT'S OPENING BRIEF

(February 28, 1992)

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Carlotta Mitchell

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* * *

grant the appellant the power to subpoena unwilling witnesses. (Attachment "G" attached hereto).

6. During the hearing before the local Board, Mitchell raised the issues that the reason for her discharge was pretextual and that race bias played a role in the decision in the following manner:

a) Her attorney commented that Mitchell was not treated as other teachers were treated and that "disparity of treatment is the hallmark of pretextual firing." (Appendix "D" to Doc. 17).

b) Her attorney commented that some of the parents in the school district may not have liked Mitchell due in part to a "racial aspect." (Doc. 17, p. 2 and Appendix "D" to Doc. 17; Doc. 65 at p. 1).

c) Mitchell testified that during her first year at Bandelier school, a parent told her that the teacher she had replaced had informed the parent that a black teacher was coming to the neighborhood and asked her what she would do about it. (Mitchell testimony, attached to defendant's Reply to Doc. 65 ("Reply") (Doc. 68) as Exhibit "I").

There are no other references to race or pretext on the record.

7. The local Board voted to confirm Barna's decision to terminate Mitchell on grounds of insubordination. (Doc. 17 at p. 3; Appendix "E"; Doc. 65 at p. 1).

8. In so holding, the local Board made and relied on the following findings and conclusions:

a) Mitchell was given adequate notice of the charges against her, an explanation of her employer's evidence, and an opportunity to present her side of the story. (Doc.17, Appendix "E" at p. 3).

b) Mitchell therefore received due process appropriate to the nature of her case. (Doc. 17, Appendix "E" at p. 3).

c) The following conduct of Mitchell constituted good and just cause for her termination:

i. On May 9, 1985, Groom instructed Mitchell to prepare a written improvement plan in three specified areas, including "mainstreaming", parent communications and student relations. (Doc. 17, Appendix "E" at p. 4).

ii. The request for improvement was justified by the evidence presented at the hearing. (Doc. 17, Appendix "E" at pp. 4-5).

iii. Over the next six months, Mitchell submitted several responses that did not constitute improvement plans, was warned that her failure to submit an appropriate improvement plan by a specified deadline would constitute insubordination and could subject her to strong discipline, and was finally advised that a continued failure to submit an acceptable plan would be grounds for termination on the basis of insubordination. (Doc. 17, Appendix "E" at pp. 5-6).

iv. On November 15, 1985, Mitchell submitted a document entitled "Improvement Plan" which was considered to be unresponsive to Groom's request and

"insolent and insubordinate." (Doc. 17, Appendix "E" at p. 6).

v. Mitchell was suspended and then terminated for continued insubordination. (Doc 17, Appendix "E" at p. 7).

vi. Mitchell's refusals to comply with Groom's lawful order "constituted insubordination which was good and just cause for her termination." (Doc. 17, Appendix "E" at p. 7).

9. The decision of the local Board did not address any claim of race discrimination, retaliation, Mitchell's exercise of her right to freedom of speech, or whether the reasons given for her termination were pretexts for illegal discrimination or retaliation. (Doc. 17, Appendix "E", *passim*).

10. Mitchell appealed the decision of the local Board to the State Board pursuant to § 22-10-19 N.M.S.A. (1984 Repl. Pamp.), the statute which governed such appeals in effect at the time. (Doc. 17 at p.3; Doc. 65 at p. 1, Attachment "G" hereto).

11. Said statute provided for a de novo hearing before a hearing officer appointed by the State Board, and limited the issues before the State Board to the following:

a) whether there had been a prejudicial departure from the procedures required by statute or regulation of the state board; or

b) whether the local school board or the governing authority of the state agency had established by a preponderance of the evidence presented that sufficient

cause existed for its decision. (§ 22-10-20(G); Attachment "G" attached hereto; Doc. 68, Exhibit "C").

* * *

actions founded on different sources of duty in federal court.[8]

The Record Before the Trial Court Was Inadequate To Permit Application of the Doctrine of Collateral Estoppel

Furthermore, the record before the district court was clearly insufficient to permit it to conclude that the first amendment issues and the issues of race discrimination and retaliation had been actually and necessarily litigated in the state proceedings. Rather, the record prepared and submitted by the defendants discloses only a few extremely minor references to race in the hearing before the local Board, one comment regarding pretext, and no references whatsoever to retaliation for the exercise of Mitchell's first amendment rights. After presumably combing the transcript of the record before the local Board for facts to support their contention that Mitchell actually litigated her civil rights claims before the local Board and that these issues were necessarily decided, the defendants were able to come up with no more than three

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[8] Moreover, the finding that Mitchell could have raised these issues for the first time before the court of appeals was erroneous. *See Bd. of Educ. of Taos Mun. Sch. v. Singleton*, 103 N.M. 722, 728, 712 P.2d 1384, 1390 (Ct. App. 1985) (grounds not raised in the administrative hearing before the local school board are precluded from consideration on appellate review).

comments in support of their argument.[9] Two of these comments were made by Mitchell's attorney in his opening statement and certainly do not constitute evidence on the record.[10]

The only testimony on the record before the local Board that the defendants were able to present to the district court in support of their contention that the issues raised in her civil rights and Title VII actions had already been previously litigated and lost was Mitchell's statement that a parent told her that a teacher told the parent that a black teacher was coming to teach at Bandelier School before Mitchell began to teach there. (Doc. 65, Appendix "I"). At best, this testimony would serve as background to her contentions in her federal actions that racially prejudiced parents lodged unfounded complaints with Groom which he failed to investigate and to which

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[9] In support of their argument for summary judgment, the defendants also filed affidavits of their attorneys and a local Board member to the effect that the race and pretext issues were litigated before the local Board. *See* Docs.61, 62, and 63. These self-serving affidavits make no reference to the places in the record where evidence of such litigation might be found. As the New Mexico Supreme Court has ruled, factual allegations contained in statements made by attorneys in support of their argument cannot inform the court as to the issues that were actually and necessarily litigated. *International Paper Co. v. Farrar*, 102 N.M. 739, 742, 700 P.2d 642, 645 (1985) (statements of the attorneys made at oral argument provide no evidence to indicate what issues were actually and necessarily litigated).

[10] These were that Mitchell had not been treated as were other teachers, that "disparity of treatment is the hallmark of pretextual firing" (Appendix "D" to Doc. 65) (no reference to race), and that some of the parents of students might not have liked Mitchell due in part to a "racial aspect" (Appendix "D").

he responded by attempting to force Mitchell out of Bandelier. It cannot possibly serve as the foundation for a finding that Mitchell actually litigated these contentions before the local Board or that the local Board necessarily decided them, particularly in the face of the complete absence of any findings by the local Board, the State Board or the court of Appeals pertaining to race, retaliation or pretext.

The New Mexico courts would not apply collateral estoppel to

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